NO. 04-63

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID B. CORNEAL AND SANDRA Y. CORNEAL,
Petitioners

v.

JACKSON TOWNSHIP, HUNTINGDON COUNTY, PENNSYLVANIA, ET AL.,
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals for The Third Circuit

BRIEF IN OPPOSITION

ANTHONY R. SHERR, ESQUIRE
Counsel of Record
LORI J. MILLER
MAYERS, MENNIES & SHERR, LLP
3031 Walton Road, Building A, Suite 330
P.O. Box 1547
Blue Bell, PA 19422-0440
(610) 825-0300 FAX (610) 825-6555
Attorney for Respondents

QUESTIONS PRESENTED

Whether the District Court and the Court of Appeals, by correctly employing this Honorable Court's stated precedent in a manner consistent with the other Circuits, properly determined that, as a threshold legal matter, the totality of the facts when viewed in the light most favorable to the Petitioners, failed to establish that Respondents' actions constitute an abuse of government power which "shocks the conscience" such that the Petitioners can sustain a substantive due process violation claim, where the record evidence demonstrates that the Respondents' actions were a matter of land use policy?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
COUNTERSTATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI.....	7
A. The District Court and the Third Circuit properly applied the appropriate rules of law attendant to Petitioners' substantive due process claim and there is, therefore, no basis upon which to grant Petitioners' Writ.....	8
B. The Third Circuit's decision is not in conflict with other Circuits on this matter, nor are they Circuits generally in conflict with regard to the Shocks the Conscience Standard.....	16
C. The Third Circuit's decision does not conflict with the decisions of this Court regarding the role of the Court and the jury.....	22
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Liberty Lobby, Inc., 477 U.S. 242(1986).....1

Bituminous Materials, Inc. v. Rice County, 126 F.3d 1068 (8th Cir. 1997) 20,21

Breithaupt v. Abram, 352 U.S. 432 (1957) 9

Chesterfield Development Corp. v. City of Chesterfield, 963 F.2d 1102. (8th Cir. 1992) 14, 16, 21

City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003) 8, 11

Collins v. Harker Heights, 503 U.S. 115 (1992)..... 8, 9

Collins v. Nuzzo, 244 F.3d 246 (1st Cir. 2001) 17, 18

Conn v. Gabbert, 526 U.S. 286 (1999).....23

Conroe Creosoting Company v. Montgomery County, Texas, 249 F.3d 337 (5th Cir. 2001)..... 20

County of Sacramento v. Lewis, 523 U.S. 833 (1998) .....*passim*

Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1982). 18

Daniels v. Williams, 474 U.S. 327 (1986). 11

Dolan v. City Tigard, 512 U.S. 374 (1994)..... 11

Graham v. Connor, 490 U.S. 386 (1989)..... 23

Harlen Associates v. Incorporated Village of Mineola, 273 F.3d 494 (2nd Cir. 2001) 19

Lisa's Party City, Inc. v. Town of Henrietta, 185 F.3d 12 (2nd Cir. 1999) 19

Natale v. Town of Ridgefield, 170 F.3d 258 (2nd Cir. 1999). 19

Naylor v. Township of Hellum, 717 A.2d 629, 633 (Pa. Cmwlth. 1998) 14

PVZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir. 1991)..... .....15, 17, 18

Rochin v. California, 342 U.S. 165 (1952) 8

Siegert v. Gilley, 500 U.S. 226, (1991). 23

Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430 (4th Cir. 2002). 20

United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa., 316 F.3d 392 (3d Cir. 2003)..... 17, 24

Village of Belle Terre v. Borras, 416 U.S. 1 (1974) 10

Statutes & Rules

35 P.S. §750.2 16

35 P.S. § 750.7 16

53 Pa. C.S. §11002-A. 3, 14

Rules of the Supreme Court, Rule 10.....7, 17

COUNTERSTATEMENT OF THE CASE[1]

This matter arises from a dispute over local land use planning and local land use decisions. Petitioners, the Corneals, have asserted a substantive due process claim, as well as other state law claims, based on the Corneals' attempt to develop and subdivide a 95-acre tract of land. The Corneals never availed themselves of state law procedure to redress the Township's alleged interference with their land development plans. The undisputed material facts of record fail to demonstrate that any actions taken by the Township shocks the conscience sufficient to prove a substantive due process violation. To the contrary, the Supervisors, Township Secretary and the municipal ordinance officers did not act arbitrarily, but rather their actions were always a matter of a land use policy.

Contrary to Petitioners allegations, the District Court thoroughly recounted the facts of record and considered them, as it repeatedly stated, in the light most favorable to the Corneals. (App. 6a, 16a, 22a, 24a). Based on the undisputed facts of record and in accord with this Court's precedent, the District Court and the Court of Appeals properly determined that the Corneals failed to adduce facts from which a reasonable jury could conclude that the Board's actions were "wholly divorced from any rational and legitimate land use concerns." Therefore, the lower Courts properly concluded as a threshold matter that the Board's actions did not "shock the conscience."

Jackson Township is a second-class township of approximately 816 residents located in Huntingdon County, Pennsylvania, with an annual local tax base of approximately $22,000.00. (A649; A1144-45).[2] The Board of Supervisors of

---

[1] As outlined below, Petitioners have ignored certain deposition testimony of Mr. Corneal's surveyor/engineer, David Simpson, Township Secretary, Ann Wirth and Township Solicitor, Newton. Nonetheless, Respondents reiterate that, "... a factual dispute is 'genuine' only if there is a sufficient evidentiary basis which would allow a reasonable fact-finder to return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

[2] In order to maintain the integrity of the Appellate record, Respondents refer to the Appendix submitted to the Third Circuit Court of Appeals as "A---". All references to the instant Appendix are stated as "App. –a."

Jackson Township meet monthly. The members included Defendants/ Respondents, W. Thomas Wilson, Michael Yoder and Ralph Weiler. The Township Secretary is Defendant, Ann I. Wirth, the Township Sewage Enforcement Office is Defendant, Barry Parks and the Building Permit Officer is Defendant, David Van Dommelen. The Township Solicitor is Larry Newton. Attorney Newton only attends the monthly Township meetings when requested by the Board of Supervisors due to fiscal constraints. (A1144-45).

In approximately 1997, the Board began discussions with regard to the development of subdivision and land development ordinance (hereinafter referred to as "SALDO"); the township citizens requested an ordinance and the Supervisors wanted more coherent planning in the Township.[3] (A571, A705). Thereafter, a two-year process ensued wherein a proposed ordinance was drafted and revised with the assistance of Richard Stahl of the Huntingdon County Planning Commission (hereinafter referred to as "HCPC"), the Pennsylvania Association of Township Supervisors and Solicitor, Larry Newton. (App. 21a; A562, A628, A646, A746, A749). The SALDO was passed at the July 10, 2000 meeting of the Jackson Township Board of Supervisors, along with privy and driveway ordinances. (A857).

In 1998, the Corneals purchased a tract of land in Jackson Township, which included an existing house and barn. (A474, A477, A484). This property previously was owned by Supervisor Wilson's grandfather. In the fall of 1999, Plaintiffs hired David Simpson to perform a survey of the property and to prepare sewage modules. (A480-81, A486-87). Corneal testified that he relied upon Simpson with respect to legal requirements. (A486). Pursuant to Simpson's advice, the Corneals contacted Defendant, Barry Parks, the Sewage Enforcement Officer of Jackson Township in order to perform tests to identify the portions of their property, if any, which were suitable for an on-lot septic system. (A480, A486-87).

---

[3] Although the Corneals belatedly attack the authenticity of these letters, these documents were previously produced. See footnote 5 below.

Mr. Corneal hired Eagle Excavation to dig the sewage test pits, which is owned, in part, by Supervisor Thomas Wilson. During the time when the test pits were dug, Mr. Corneal testified that Mr. Wilson advised him that while there were no subdivision requirements in the Township, Mr. Corneal needed the SEO's approval on the sewage pit locations, which then had to be submitted to the Township. (A486). Mr. Wilson testified that at some point, he advised Mr. Corneal that if he was going to subdivide, he should do it before the year 2000 because the Township had been working on an ordinance. (A633). Mr. Parks signed the initial percolation tests. (A526). Ultimately, Parks reviewed and signed sewage modules on February 19, 2000. (A526).

In January 2000, approximately six months prior to the adoption of the SALDO, the Board imposed a moratorium on new subdivision development. (App. 7a). The Township contacted its Solicitor, Larry Newton to determine whether a moratorium on subdivisions was permissible. (A746). Attorney Newton advised the Township that he believed that the Township could impose a moratorium. (A751). Mr. Newton testified that he believed this to be true, even though there was no subdivision ordinance in effect. (A751).[4]

Mr. Simpson testified that initially Mr. Corneal expressed a desire to lay out approximately nine lots. (A847, A84). Mr. Simpson contacted the Township Secretary on or about January 25, 2000 in order to determine the date of the Township's next monthly meeting; he recalled that Ms. Wirth may have informed

---

[4] Petitioners ignore the deposition testimony of Township Solicitor. Specifically, as the District Court observed, before enacting the moratorium, "... Defendant, Wirth consulted with Newton, the Township Solicitor, regarding whether the Township had the power to enact the moratorium. He indicated that the Board had such power." (App. 26a). Additionally, Petitioners failed to challenge the procedures by which the moratorium and the subdivision ordinance were adopted in the appropriate forum provided for under Pennsylvania state law. See 53 Pa. C.S. §11002-A. On this basis, Petitioners' procedural due process claim failed and is not at issue. Nonetheless, as the District Court determined, "... it is beyond dispute that the Township had been working on developing such an ordinance in conjunction with Huntingdon County officials for approximately two years before the Corneals submitted their original subdivision proposal." (App. 21a).

him that the Township was working on adopting a Township subdivision ordinance and that there was a moratorium on new subdivisions within the Township. (A849). Mr. Simpson conveyed this information to Mr. Corneal. (A849).

Mr. Simpson completed the initial subdivision plan on February 4, 2000, which provided for a three-lot subdivision. (A850). Mr. Corneal then presented the initial set of subdivision plans or sketches to the Board of Supervisors at the February 7, 2000 meeting. (A847, A855). At that time, Mr. Corneal was advised that there was a moratorium on subdivision development in the Township, and on this basis the Supervisors refused to review the Corneals' preliminary plans (App. 7a; A640, A854, A7). Two other subdivision plans unrelated to Corneal, were also held in abeyance. (A543, A857).

Mr. Corneal submitted the initial subdivision sketches to the Huntingdon County Planning Commission for review. By letter dated February 24, 2000, the Huntingdon County Planning Commission recommended denial of Plaintiffs' initial plans or sketches. (App. 8a). In the interim, on or about March 22, 2000, the Corneals submitted a second proposal for a subdivision to the HCPC. (A866). This proposal also was for a three-lot subdivision. (A866).

On April 3, 2000, at the meeting of the Township Supervisors, Mr. Corneal requested that the Supervisors sign sewage modules. (App. 8a). With respect to the sewage modules, "... the Supervisors would not sign them [the sewage modules] because we [the Board] didn't have the subdivision plan or anything." (A650). Mr. Wilson stated that the Supervisors, "... were not signing five sewer modules for one house." (A652).

Corneal stated that he informed the Board that he was no longer sub-dividing and would like to build a studio and at the same time requested a permit for a privy and a building permit on that date; the Supervisors advised Mr. Corneal that they were not issuing any building permits for a property that they believed was going to be subdivided until they had passed the SALDO. (A856). Mr. Parks told Mr. Corneal that due to conditions on his property

DEP regulations precluded use of a privy. (App. 9a). Mr. Parks told Mr. Corneal that he could not use a privy on his property at that time because the Corneals had piped water on the property and water under pressure. (App. 9a). Under DEP regulations, this precluded use of a privy. (App. 9a).

Four days after the April Township meeting where Mr. Corneal stated that he was no longer subdividing, Simpson revised Mr. Corneal's subdivision plans. The new draft, dated April 7, 2000, included only two proposed lots: one small lot with the existing house and a barn, and a second lot, which was the remainder of the property, provided for the construction of an apartment, garage and/or art studio. (App. 9a). Corneal submitted a plan dated April 7, 2000, to the Huntingdon County Planning Commission. The proposal included plans for a house and a studio on Lot 2. (A1142). By letter dated April 20, 2000, the Huntingdon County Planning Commission recommended conditional approval of the revised plan, pending adoption of the subdivision and land development ordinance by Jackson Township. (App. 9a). The Corneals never submitted this subdivision plan to the Township. (App. 5a).

On or about April 27, 2000, Mr. Corneal requested a building permit from the Township Permit Officer, David Van Dommelen. At that time, Mr. Corneal's plans apparently included an apartment and/or art studio above a garage. (A1142). Mr. Van Dommelen stated that he denied Mr. Corneal's request for a building permit because Mr. Corneal did not have proper documentation for a subdivision and sewage. (A696, A703, A706, A722). Mr. Van Dommelen did not provide the Corneals with a permit application. (A706).

Mr. Van Dommelen reiterated that even if Corneal wanted to build one structure on one piece of property, it would still be a subdivision because of the existing structure. (A704, A517-18, A519-22). Mr. Van Dommelen admitted that during Mr. Corneal's visit to Van Dommelen's home he referred to Mr. Corneal as a "trouble making yuppie from over the mountain," but testified that this was based on Mr. Van Dommelen's belief that Mr. Corneal,

"... behaves like someone who wants to get their own way and in his age group."[5] (App. 10a).

In spite of the moratorium and without any required permits, Mr. Corneal began construction on his property in the spring of 2000, including construction of his driveway. Soon thereafter, on or about June 30, 2000, Plaintiffs filed this purported civil rights action in the United States District Court for the Middle District of Pennsylvania. Mr. Corneal never availed himself of state court proceedings for an action in mandamus or an appeal of the actions of the Board of Supervisors.

In early July 2000, the Township adopted various ordinances, including the SALDO. The moratorium on subdivision development was extinguished. Plaintiffs did not seek either subdivision approval or appropriate permits for the continued construction on their property.

On July 28, 2000, Township Solicitor Newton advised the Corneals that they were in violation of the Township's building permit ordinance since they had begun construction on their property without first obtaining the requisite building permits, (A1124) and requested that they cease and desist any and all further construction until a building permit is obtained. In October 2000, the Township brought suit against the Corneals to enjoin construction. This lawsuit was settled. (App. 11a). Since the filing of the instant lawsuit on June 30, 2000 the Township has granted all permits and approvals necessary to begin development of the Corneals' tract of land. (App. 11a). By the spring of 2001, Mr. Corneal completed his construction.

---

[5] Although the Corneals largely premised their argument in opposition to Defendants' Motion for Summary Judgment below on this statement, the District Court noted, in relevant part that, "while the Corneals, as the non-moving party 'are entitled to all inferences which are fairly supported by the evidence'... [they] are not permitted to build their case on mere 'opprobrious epithets' of malice... or the 'gossamer threads of whimsy speculation and conjecture.'" (App. 16a) (citations omitted).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Supreme Court Rule 10 outlines the considerations governing review on *certiorari* and provides, in relevant part, as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; . . .
>
> (c) ... a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A Petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rules of the Supreme Court, Rule 10.

Although Petitioners acknowledge this Court's holding in *County of Sacramento v.* Lewis, 523 U.S. 833, 858 (1998) that the

appropriate standard for substantive due process claims, including land use cases, is that which "shocks the conscience," they argue that this Court should grant their Petition for Writ in order to determine, "what is the standard of conduct required to establish a substantive due process violation by an unhurried land use official against a property owner..." (See Petition for Writ, p. 9). *County of Sacramento v. Lewis*, 523 U.S. 833, 858 (1998); *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992); *Rochin v. California*, 342 U.S. 165, 169 (1952). The Appellate Circuits have recognized and adhered to the proper standard. The question for which Petitioners argue in support of their Writ has been settled previously by this Court and applied consistently by the Circuit Courts. *See City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 199 (2003). The District Courts and the Third Circuit below, as well as the other Circuits, have ably interpreted and applied this Court's precedent regarding the "shocks the conscience" standard in land use cases. Contrary to Petitioners' contentions, the Circuits are not in disarray or in conflict with regard to the applicable substantive due process standard of "shocks the conscience". For these reasons, Petitioners' Petition for Writ of *Certiorari* must be denied.

A. THE DISTRICT COURT AND THE THIRD CIRCUIT PROPERLY APPLIED THE APPROPRIATE RULES OF LAW ATTENDANT TO PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM AND THERE IS, THEREFORE, NO BASIS UPON WHICH TO GRANT PETITIONERS' WRIT

Petitioners complain of what they describe as the stringent nature of the "shocks the conscience" standard. As the District Court and Third Circuit properly observed, the Supreme Court's substantive due process precedent demands that before conduct can be recognized as violating substantive due process protections, the conduct at issue must "shock the conscience."

"The touchstone of due process is protection of the individual against arbitrary action of the government." *Lewis*, 523 U.S. at 845. In a substantive due process case, "... the threshold question is whether the behavior of the governmental officer is so

egregious, so outrageous, that it may be fairly said to shock the contemporary conscience … Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action." *Collins*, 503 U.S. at 129.

In *Lewis*, this Honorable Court emphasized, "… that conduct that 'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with the traditional ideas of fair play and decency would violate substantive due process." *Lewis*, 523 U.S. at 847, *citing Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (internal citations omitted). This Court went on to note:

> … we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone 'with state authority causes harm' … the 14th Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the state,' … 'our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.' We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience – shocking level.

Lewis, 523 U.S. at 848-849 (citations omitted) (emphasis supplied). Clearly, substantive due process claims are limited to action, which is constitutionally significant and egregious.

This Court has consistently sought to avoid the Federal Courts becoming a local Zoning Board of Appeals. *See Village of Belle Terre v. Borras*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). This overarching policy is consistent with this Court's delineation of the contours of substantive due process. A property owner's claim of a substantive due process violation arises only where the alleged official conduct consisits of conscience shocking behavior. There must be a demonstration of, "... conduct intended to injure in some way unjustifiable by *any government interest* [in order to evidence] the sort of official action most likely to rise to the conscience – shocking level." *Lewis*, 523 U.S. at 849 (emphasis added) (citations omitted). The District Court and the Third Circuit appropriately applied the applicable rules attendant to substantive due process claims and properly determined, that Petitioners' substantive due process claim failed where Respondents' alleged actions were not arbitrary but rather were a matter of land use policy. There is absolutely no basis upon which to grant Petitioners' Petition for Writ of *Certiorari* and, as such, it must be denied.

Contrary to Petitioners' allegations, the District Court, and the Third Circuit, properly employed the "shocks the conscience" standard. Petitioners specifically complain that the District Court and the Third Circuit somehow erred and misinterpreted the shocks the conscience standard when both Courts determined that in order to sustain a substantive due process claim in this context, Petitioners must have adduced evidence from which a reasonable jury could conclude that Respondents' action did not serve any rational land use purpose or, in other words, were "completely unrelated in any way to a rational land use goal." (App. 3A, 18A, 22A, 27A). The Lower Courts' analysis is consistent with the applicable rules of law, attendant to substantive due process, and this Court's precedent.

The substantive due process rights protect against, the exercise of power without any reasonable justification in the service of a legitimate governmental objective ..." *Lewis*, 523 U.S. at 846, *citing Daniels v. Williams*, 474 U.S. 327, 331 (1986). In other words, a substantive due process claim may lie where there is, "... conduct intended to injure in some way unjustifiable *by any government interest* ..." Id. The District Court, in its reasoned Opinion below, relied, in part, on this Court's decision in *Dolan v. City Tigard*, 512 U.S. 374, 387 (1994). This Honorable Court held that the absence of a nexus between a permit condition and a legitimate state interest converts a valid land regulation into an out-and-out plan of extortion." (See App. 18A). Petitioners ignore this Court's recent decision involving a substantive due process claim. In *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), the City submitted to voters a facially neutral referendum petition calling for repeal of a municipal housing ordinance authorizing construction of a low-income housing complex and refused to issue building permits while the petition was pending. This Court determined that the City's engineer's refusal to issue the permits while the petition was pending, "... in no sense constituted egregious or arbitrary government conduct," and cited the decision in *Lewis*. Additionally, this Court commented as follows:

> In light of the charter's provision that 'no such ordinance [challenged by a petition] shall go into effect until approved by a majority of those voting thereon,' ... the law director's instruction to the engineer to not issue the permits represented an eminently rational directive.

Cuyahoga Fall, 538 U.S. at 199. In other words, the City officials', actions were justified in the service of a legitimate governmental objective, were rational, and were not conscience-shocking. The District Courts' application of the "shocks the conscience" standard in this case comports with this ruling.

Petitioners contend that the lower Courts' decisions are inconsistent with this Court's rulings, in that the "totality of the circumstances" was not considered, nor purportedly was there a

distinction made between hurried and unhurried conduct. (See Petition, pp. 14-15). However, a thorough analysis of the lower Courts' decisions, particularly the District Court's lengthy factual analysis, demonstrates that all of the evidence in this case was carefully considered in the light most favorable to the Petitioners. Petitioners challenge and their basis for asking this Court to grant *certiorari* is in actuality nothing more than an assertion that the Lower Court made erroneous factual findings and misapplied a properly stated rule of law.

As Petitioners point out, the District Court entertained two sets of summary judgment motions by the parties below. Further, whether an official's conduct is hurried or unhurried is but one element of the "shocks the conscience" analysis. It is not, however, its own separate test. As the *Lewis* decision advises, "...our concern with preserving the constitutional proportions of substantive due process demands *an exact analysis of the circumstances* before any abuse of power is condemned as conscience shocking." *Lewis*, 523 U.S. at 850 (emphasis added).

Petitioners did not meet their summary judgment burden of demonstrating that a material dispute of fact existed. They simply presented no evidence, which demonstrate in any way that Respondents' actions "shock the conscience." Rather, the undisputed material facts of record demonstrated that all of Respondents' actions were a matter of land use policy. The undisputed material facts demonstrated that the following actions were taken with respect to Mr. Corneal's property:

(1) Informing Mr. Corneal in February 2000 that the Board was not considering new subdivision proposals as a result of a moratorium;

(2) Refusal to sign sewer modules in April of 2000, because it would constitute subdivision approval;

(3) Refusal to issue permits in April of 2000 because subdivision approval was necessary;

(4) Filing an action with the Huntingdon County Court of Common Pleas requesting an Order requiring Corneal to cease and desist construction activities until he had complied with DEP regulations and statutes as well as local ordinances.

The record evidence thus demonstrates that there were no improper actions taken by the Township officials, which in any way improperly interfered with Petitioners' land development, let alone consisted of conscious shocking actions.

The process of drafting and adopting the subdivision and land development ordinance (hereinafter "SALDO") began two years before the Corneals sought to develop their property. (App. 21a). Petitioners presented no evidence to support their allegation that the SALDO was adopted to prevent the Corneals from developing their property. Rather, the undisputed facts demonstrated that the process of drafting and adopting the SALDO was a matter of land use planning and policy and was completely unrelated in any way to Mr. Corneal.[6] Contrary to Petitioners unsupported argument to this Court, the letter dated August 2, 1999, by Denson Groenendaal on behalf of the local citizen group predates by a approximately six months the moratorium and also predates the Corneal/Hewett contract as well as any of the subdivision plans or preparations by the Corneals. The facts of record do not support any other reasonable inference or conclusion other than that the land use planning and policy to enact the SALDO was completely unrelated in any way to Mr. Corneal.

In January 2000, Jackson Township imposed a moratorium. (App. 26a). Prior to its imposition, respondent Wirth consulted with Township Solicitor Newton regarding whether the Township had the authority to enact the moratorium; Solicitor

---

[6] The Corneals belatedly attacked the authenticity of the letters authored on behalf of the local citizen group by Denson Groenendaal. However, the Corneals made voluminous copies of Township files, records, correspondence and other documents of which Respondents received a complete set of copies. These letters were included in those documents, and were produced. That Petitioners now argue in this Court that these documents should not be utilized, underscores the fact that their Petition is nothing more than an attempt to have a decision reviewed because Mr. Corneal did not like the result.

Newton advised that the Township had such power. (App. 26a). At the time the Jackson Township Board of Supervisors imposed the moratorium on new subdivisions, the Pennsylvania Courts endorsed moratoriums. *See Naylor v. Township of Hellum*, 717 A.2d 629, 633 (Pa. Cmwlth. 1998), reversed 565 Pa. 397, 773 A.2d 770 (2001). All of Respondents' subsequent actions must be viewed in this context; Respondents believed that they had properly enacted a moratorium, which they had a right to enforce, as they revised and prepared to adopt the SALDO. The moratorium was in effect one month before Corneals' first proposed subdivision was even drafted. (App. 26a). The undisputed material facts clearly demonstrate that the moratorium was not imposed in order to prevent the Corneals from developing their property. The facts of record do not support any other reasonable inference or conclusion.

The District Court considered whether the enactment of the moratorium in January 2000 could shock the conscience. (App. 25a-26a). Tellingly, Petitioners failed to challenge the procedures by which the moratorium or the SALDO were adopted in State Court. They did not seek review of any of the Township's action via an appeal or mandamus action to the Common Pleas Court of Huntingdon County, PA. See 53 Pa. C.S. §11002-A. The District Court and the Third Circuit specifically addressed the Petitioners' argument below that the Board "did not have power to enact the moratorium." (App. 25a-26a). The District Court determined, in part, that, "... even if the Board lacked the authority to enact the moratorium and may not have followed the proper procedure for enacting, these facts will not insulate the Corneals' claim from summary judgment. It is further noted that even if Solicitor Newton's conclusion appears to have been wrong with regard to the Supervisor's ability to enact a moratorium, "... an error of state law does not amount to an actionable claim for violation of substantive due process." *See Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) ("a bad faith violation of state law remains only a violation of state law.") (App. 25a-26a).

Both the District Court, and the Third Circuit made these determinations only after considering and addressing other

purported "undisputed bad acts" of the Respondents. The District Court fully recounted the facts of record and considered them, as it repeatedly stated, in the light most favorable to the Corneals. (App. 6a, 15a, 16a, 22a, 24a). The District Court's thorough recitation of the facts addressed and acknowledged the actions of each of the Respondents, including the sewage and permit officers.[7] The Court concluded in relevant part as follows:

> Although the Corneals point to a litany of other decisions relating to the issuance of building permits and sewage modules, those decisions are properly viewed as extensions of the Board's initial decision to hold all subdividing in the Township until the Board could enact a comprehensive land use ordinance. (App 21a-22a).

The undisputed material facts of record demonstrate that there were no improper actions taken by the Township officials which could be characterized as so egregious or arbitrary as to be conscience shocking in the constitutional sense. In summary, the record evidence fails to demonstrate that Defendants' actions were "conscience shocking," such that Plaintiffs can demonstrate a claim for a substantive due process violation. The Supervisors, Township Secretary and the Municipal Ordinance Officers did not act arbitrarily, but rather their actions were always a matter of land use policy. There is no evidence in this case that the Township engaged in delay tactics for the purpose of refusing to issue permits. *See PVZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 32

---

[7] While Petitioners contend that the District Court did not consider the alleged "undisputed bad acts", of the Respondents, the District Court specifically addressed Mr. Van Dommelen's actions in footnote 8 of its decision. The District Court concluded that "... while other applicants sought similar permits, no other permit applicant was similarly situated. Unlike the other applicants for building permits during the pendency during the moratorium, the Corneals needed to subdivide their property to be eligible for the building permits they sought due to the existing dwelling on their property." (App. 21a). Indeed, the Court further concluded that the Corneals did not present any evidence that other developers or landowners were granted subdivision approval or that the Corneals were subject to more owners' conditions as other similarly situated permit applicants. (App. 25a).

(1st Cir. 1991). For instance, DEP, by way of the Sewage Facilities Act, requires review and approval of proposed subdivisions regardless of local regulation. (See 35 P.S. §§750.2 and 750.7). In this regard then, the Township's insistence on proper sewage tests, modules and permits was not capricious or "conscience shocking," but rather was mandated by DEP standard and regulations. Like the cases relied upon by the Third Circuit in the *Warrington* decision itself, there is no evidence that the Township "knowingly enforced the invalid zoning ordinance in bad faith ..." *See City of Chesterfield*, 963 F.2d at 1104-05. Rather, as outlined above, the Township had enacted a temporary moratorium and was in the process of drafting and approving a subdivision and land development ordinance. No other subdivisions were approved during this period and others were held in abeyance similar to Mr. Corneal's. Simply, these land use decisions were a matter of local concern and do not rise to the level nor can they be transformed into substantive due process claims based on Petitioners' allegations. On this basis, the District Court's and the Third Circuit's decisions provide absolutely no basis upon which to grant the instant Petition for Writ of *Certiorari* and, as such, it must be denied.

B. THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH OTHER CIRCUITS ON THIS MATTER, NOR ARE THE CIRCUITS GENERALLY IN CONFLICT WITH REGARD TO THE SHOCKS THE CONSCIENCE STANDARD

The Third Circuit's decision below is not in conflict with this Court's precedent or other Circuits on this matter. The Circuits are consistent with regard to their interpretation and application of the shocks the conscience standard in land use cases. Petitioners' complain that the Lower Courts have inconsistently defined the contours of the shocks the conscience standard for property rights and, further complain that the adopted tests are stringent. However, by its very nature, substantive due process represents the outer limits of tort liability and its threshold is inherently stringent.

As set forth above, the Third Circuit specifically adopted this Court's shocks the conscience standard in land use cases, the case of *United Artists Theatre Circuit, Inc. v. Township of Warrington*, Pa., 316 F.3d 392 (3d Cir. 2003). Petitioners complain that the Third Circuit therein adopted an "all-or-nothing" approach. (See Petition for Writ, p. 18). Specifically, Petitioners object to the *United Artists* decision, ruling that, "... unless the Defendants' actions were 'completely unrelated in any way to a rational land use goal,' there is no violation" of substantive due process. (See Petition for Writ, p. 18; App. 3A). The District Court and the Third Circuit's Opinions in this matter relied upon and properly applied the *United Artists* decision. In turn, that case, as well as the Third Circuit's Opinion in this matter relied upon *Lewis*. In *Lewis*, this Honorable Court determined that unless the Respondents' actions were "completely unrelated in any way to a rational land use goal," there is no substantive due process violation. *See Lewis*, 523 U.S. at 846. In other words, where the official action at issue is related in some way to a legitimate or rational land use goal, that official's conduct necessarily cannot permeate the shocks the conscience threshold. The Third Circuit's decision in this matter is not contrary to that of other Circuits, nor, more importantly, is it contrary to Supreme Court precedent. Petitioners have not demonstrated otherwise.

Petitioners further complain that, "... other Circuits have adopted stringent tests, which achieve similar end results ... but each utilizes different language to define the contours." While each Circuit may utilize different language, as Petitioners contend, to define the contours of the shocks the conscience standard, their interpretation of the shocks the conscience standard is not inconsistent. As such, there is no basis to grant Petitioners' Petition for Writ of *Certiorari*. See Rules of Supreme Court, Rule 10.

In the First Circuit, in order to establish a substantive due process claim, a Plaintiff must demonstrate an, "... abuse of government power that shocks the conscience" or "action that is legally irrational and that it is not sufficiently keyed to any legitimate state interest." *See Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001), *citing*, *Rodriguez*, 928 F.2d at 31-32. In *Collins*, an

applicant was denied a new annual license to operate his used car lot. The applicant sued the City alleging, among other things, a *substantive due process* violation. The First Circuit determined that the applicant failed to demonstrate that the denial of his license constituted a conscience shocking abuse of governmental power, where there was a four-year history of license violations and despite the fact that the applicant had a contentious relationship with a City alderman. *Collins*, 244 F.3d at 251. In *PVZ Properties, Inc.*, a developer brought a civil rights action against a Puerto Rican agency and its former administrator following the agency's rejection of construction permits. The First Circuit determined that even assuming that the agency engaged in delay tactics and refused to issue permits for the developer's project, based on considerations outside the scope of its jurisdiction, "... such practices, without more, do not rise to the level of violations of the Federal Constitution under a substantive due process label." *Rodriguez*, 928 F.2d at 32. As the Third Circuit observed, "... land use decisions are matters of local concern, and such should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives." *Warrington*, 316 F.3d at 402. In this regard, the First Circuit made the following relevant observation:

> Every appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but '[i]t' is not enough simply to give those state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under §1983.

Warrington, 316 F.3d at 402, *citing Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982). Based on the foregoing, the First Circuit has recognized the "shocks the conscience" standard and has interpreted it similarly to that of the Third Circuit requiring that a Plaintiff demonstrate that a government action is either legally irrational, or "not sufficiently keyed to any legitimate state interest" in order to sustain a substantive due process claim.

The Second Circuit similarly has relied on this Honorable Court's decision in *Sacramento v. Lewis* in determining that, "... substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2nd Cir. 1999), *citing* Lewis, 523 U.S. at 846. In subsequent Second Circuit decisions, the Second Circuit has denied substantive due process claims and determined that they were not so "outrageously arbitrary as to constitute a gross abuse of governmental authority," where there was a legitimate basis for the municipal action. In *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12 (2nd Cir. 1999), a shopping mall tenant brought an action against the town alleging Lanham Act and civil rights violations for the town's purported denial of the tenant's request for a sign permit variance. The Second Circuit affirmed the District Court's determination that the town had a "legitimate reason for its decision to deprive Lisa's Party City of its interest in erecting a sign that was fully consistent with its federally registered trademark ... [where] the town's ordinance properly takes into account aesthetic concerns in limiting the range of colors available for exterior signs." *Lisa's Party City*, 185 F.3d at 17. As the Second Circuit determined, since the town acted in accordance with a legitimate concern, it did not act in an outrageously arbitrary manner so as to violate Lisa's Party City's substantive due process rights. In *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494 (2nd Cir. 2001), a property owner sued the Village Zoning Board pursuant to §1983, where his application for a special use permit allowing him to operate a convenience store had been denied. The Second Circuit determined that the Village Zoning Board had a legitimate interest, which could rationally be furthered through the denial of the property owner's application. *Harlen*, 273 F.3d at 505. On this basis, the Second Circuit determined that the Board's actions did not "transgress the 'outer limit' of legitimate government action, therefore, they did not give rise to a federal substantive due process claim." Id. Hence, the Second Circuit has similarly interpreted the "shocks the conscience" standard with regard to its use in property and land use cases.

In the Fourth Circuit, in order to state a valid substantive due process claim, a Plaintiff of course, must demonstrate a protectible property interest, which has been deprived by the State and further, demonstrate that, "... the State's action falls so far below the outer limits of legitimate governmental action that no process could cure the deficiency." *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002). In *Tri-County*, the County denied a building permit for a proposed asphalt plant and subsequently adopted a moratorium on asphalt plants and enacted a polluting industry development ordinance, which restricted the operation of asphalt plants. The Fourth Circuit denied the Plaintiff, paving contractor's substantive due process claim and determined that the County's actions, "... clearly did not fall beyond the outer limits of legitimate governmental action." *Tri-County*, 281 F.3d at 440. To the contrary, the Court determined that the County's actions were rationally related to a legitimate government purpose including, in part, protecting health, safety, general welfare and property values of the County's citizens. Based on the foregoing, the Fourth Circuit has not inconsistently defined the contours of the shocks the conscience standard in property cases.

In the Fifth Circuit, the Court of Appeals has adopted the "shocks the conscience" standard in reviewing substantive due process challenges to executive action, and examines, "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Conroe Creosoting Company v. Montgomery County, Texas*, 249 F.3d 337, 341 (5th Cir. 2001), *citing Lewis*, 523 U.S. at 842.

In the Eighth Circuit, in *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1071 (8th Cir. 1997), the Plaintiff, BMI challenged a decision by the County Commissioners to impose restrictions on BMI's permit to locate a temporary asphalt pit in Rice County. Although BMI presented evidence that the Board was motivated by personal animus against BMI's Permit Officer, the District Court granted summary judgment in favor of the County. On appeal, the Eighth Circuit upheld the decision and stated that, "... the Board had rational bases upon which to restrict

BMI's permit." *Rice County*, 126 F.3d at 1070. Relying on *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992), the Eighth Circuit reiterated that allegations of personal animus alone are insufficient to survive a summary judgment motion on a substantive due process challenge to a land use decision. (App. 22a).

The foregoing demonstrates the Circuits have consistently, rather than inconsistently, defined and addressed the contours of the shocks the conscience standard in land use cases. There is absolutely no evidence that the Circuits are ignoring the dictates of this Honorable Court with regard to considering the totality of the circumstances, contrary to Petitioners contention. While Petitioners argue that the instant standard effectively forecloses this remedy in land use cases, such is not the case where the government conduct pierces the shocks the conscience threshold. In this regard, the District Court stated:

> ...a substantive due process claim under the "shocks the conscience" test will survive summary judgment only if the plaintiff can present evidence from which a jury could conclude that the locality's decision was not rationally related to a legitimate land use goal. As a result, the plaintiff must demonstrate that the land use decision or regulation was so totally irrational that it could not possibly be the real reason for the locality's action or, alternatively, that the locality applied its decision selectively so that its land use concern could not have been legitimate despite the rational basis for it.

(App. 24a). Hence, contrary to Petitioners contention, particularly in the Third Circuit, a property owner's case is not foreclosed upon a showing as outlined by the District Court. In this case, which Petitioners ignore, they offered no evidence of purported disparate treatment or "pretext." (App.25a) Again, while Petitioners object to the stringent nature of the threshold "shocks the conscience, " such is not without reason as stated by the lower court:

> While this is obviously an onerous burden to plaintiffs, the reason for it is not without logical support. As the First Circuit stated: Substantive due process, as a theory of constitutional redress, has in the past fifty years been disfavored, in part because of its virtually standardless reach. To apply it to claims like the present would be to insinuate the oversight and discretion of federal judges into areas traditionally reserved for state and local tribunals. Clearly, it is no simple matter to decide what abuses to regard as abuses of "substantive" due process. Every litigant is likely to regard his own case as involving such an injustice. Thus, we have consistently held that the due process clause may not ordinarily be used to involve federal courts in the rights and wrongs of local planning disputes. In the vast majority of instances, local and state agencies and courts are closer to the situation and better equipped to provide relief. We have left the door slightly ajar for federal relief in truly horrendous situations. But, this circuit's precedent makes clear that the threshold for establishing the requisite "abuse of government power" is a high one indeed. *Nestor Colon Medina & Sucesores,* 964 F.2d at 45.

(App.24a). Based on the lack of any conflict or inconsistency amongst the Circuits, there is no basis upon which to grant the Petition for Writ. As such, it must be denied.

C. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT REGARDING THE ROLE OF THE COURT AND THE JURY

Petitioners contend that the Third Circuit's disposition conflicts with the decisions of this Court as follows:

> Concerning the role of courts and juries in weighing the evidence and making credibility determinations for the purpose of addressing whether a stated goal is legitimate or rational or a pretext contrived to justify the official's conduct; whether the official's actions were in furtherance of and rationally related to the stated goal; and, ultimately, whether the totality of the actions rises to the level of arbitrary and irrational conduct so as to constitute a substantive due process violation.

(See Petition for Writ, p. 23). However, Petitioners misapprehend the role of the Court in this matter. As this Honorable Court has stated, in any action under §1983, "... the first step is to identify the exact contours of the underlying right said to have been violated." *Lewis*, 523 U.S. at 842, n. 5, *citing Graham v. Connor*, 490 U.S. 386, 394 (1989). The question of whether a Plaintiff has asserted a violation of a constitutional right at all is purely a question of law. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). In other words, it is for the Court to determine whether the Corneals' claim constitutes a substantive due process violation under the applicable standard in the first instance.

Based on the Lower Courts' rulings, the Courts, as a matter of law, properly determined that the Corneals' claim did not constitute a substantive due process violation under the "shocks the conscience" test. (App. 25a). As the District Court repeatedly stated, in order to survive summary judgment under the "shocks the conscience" test, "... the Corneals must have adduced evidence from which a reasonable jury could conclude that the Board's actions did not serve any rational land use purpose." (App. 18a, 20a, 24a, 27a). The District Court further stated, in relevant part:

> As a result, unless the evidence indicates that the challenge is completely unrelated in any way to a rational land use goal, there is no violation of substantive due process. The corollary of that rule being that where the locality's decision is

> related in any way to some rational goal, then no due process violation occurs even if the locality may have exceeded the scope of its jurisdiction.

(App. 19a). The Third Circuit, in affirming the District Court's Order, stated that, "... unless the Defendants' actions were 'completely unrelated in any way to a rational land use goal,' there is no violation." (App. 3a). The Third Circuit further commented, in relevant part, as follows:

> Although some conduct may evidence personal animus – such as calling Mr. Corneal 'that trouble-making yuppie from over the mountain' – under *United Artists*, mere improper motives are not conscious-shocking. *See United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa.*, 316 F.3d at 400-01. (Court's Footnote omitted).[8]

(App. 3a).

Based on the foregoing, the District Court and the Third Circuit's analyses and opinions comport with the decisions of this

---

[8] Petitioners' argument that the jury should have considered purported evidence of improper motive is irrelevant. As demonstrated by the District Courts and Third Circuit Court's Opinions, mere improper motive or purported illegitimate personal animus, even if substantiated, is not enough to establish a violation of substantive due process, which, again, is the threshold legal determination made by the Court. In any regard, as the District Court and Third Circuit determined, the Corneals failed to adduce evidence from which a reasonable jury could conclude that Defendants' rational land use concern was a mere pretext. (App. 25a). Both Courts determined that the Petitioners claim that Defendant, Wilson acted with personal malice was unsubstantiated and essentially constituted mere speculation. (App. 3a). Additionally, the District Court criticized the Petitioners' reliance, as evidence of personal animus, on Defendant, Van Dommelen's alleged statement that Mr. Corneal was a "troublemaking yuppie from over the mountain." (App. 16a). Further, Petitioners failed to offer any evidence with regard to disparate treatment. As the Courts properly determined, purported evidence of mere improper motives is insufficient to implicate Petitioners' substantive due process rights, and, also, the record evidence, as viewed in the light most favorable to Petitioners, failed to demonstrate any real personal animus. On these additional bases, Petitioners' Petition for Writ of Certiorari must be denied.

Court concerning the role of the Court and the jury. The Courts were obligated to define the contours of that which may have implicated a substantive due process violation under the applicable standard of "shocks the conscience." The evidence, as adduced by Petitioners, failed to implicate any substantive due process right. On these bases, the District Court, and the Third Circuit Courts' Opinions were not in error, nor were they in conflict with this Court's dictates concerning the role of the Court and the jury. Accordingly, Petitioners' Petition for Writ of *Certiorari* must be denied.

CONCLUSION

Based on the foregoing, Respondents, Jackson Township, W. Thomas Wilson, Michael Yoder, Ralph Weiler, Barry Parks, David Van Dommelen and Ann I. Wirth respectfully request that this Honorable Court deny Petitioners' Writ of *Certiorari*.

Respectfully submitted,

ANTHONY R. SHERR, ESQUIRE
Counsel of Record
LORI J. MILLER
MAYERS, MENNIES & SHERR, LLP
3031 Walton Road, Building A, Suite 330
P.O. Box 1547
Blue Bell, PA 19422-0440
(610) 825-0300 FAX (610) 825-6555
Attorney for Respondents